Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

JUAN RAMIREZ, JR and DAVID L. LEVY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was an appellant in a Florida District Court of Appeal matter. Respondents were two of the three appellate judges assigned to hear that matter. In a "Do Not Publish" opinion, the Eleventh Circuit has concluded that even though Respondents admitted to engaging in an un-noticed, *ex-parte* communication with Petitioner's opposing counsel immediately prior to oral argument before them for the alleged purpose of conspiring to deprive Petitioner of fundamental and constitutionally guaranteed rights, the Respondents are nonetheless entitled to judicial immunity from suit for violation and conspiracy to violate such rights. This holding presents three questions for review:

First, whether the determination of the affirmative defense of judicial immunity to a claim of violation of fundamental and constitutionally protected rights and conspiracy to violate those right in this matter was a factual question improperly resolved on a motion to dismiss pursuant to Rule 12(b)(6)?

Whether the United States Court of Appeals for the Eleventh Circuit has improperly continued its expansion of the scope of judicial immunity thereby *de facto* adding to 42 U.S.C. §1983 an exception that "Judges in the former states of the confederacy will be able to deal willy nilly with the rights of citizens without having to account for their willfully unconstitutional actions."

Whether the doctrine of *stare decisis* prohibits "Do Not Publish" decisions from the circuit courts?

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceeding in the court below:

Montgomery Blair Sibley, Petitioner/Appellant.

Juan Ramirez, Jr and David L. Levy, Respondents/ Appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Montgomery Blair Sibley, through undersigned counsel, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit entered on January 18, 2005.

OPINIONS BELOW

The August 16, 2004, opinion of the United States District Court for the Southern District of Florida dismissing the complaint is reprinted in the appendix hereto, *Appendix-2, infra.* The January 18, 2005, "Do Not Publish" opinion of the Court of Appeals for the Eleventh Circuit affirming the District Court's dismissal is reprinted in the appendix hereto, *Appendix-8, infra.* The February 22, 2005, decision of the Court of Appeals for the Eleventh Circuit denying rehearing is reprinted in the appendix hereto, *Appendix-13, infra.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

(Set-out in Appendix)

42 U.S.C. §1983
42 U.S.C. §1985(2)
Eleventh Circuit Rule 36-2

STATEMENT OF THE CASE

Petitioner Montgomery Blair Sibley is a citizen of the United States and a resident of the State of Maryland. Respondents, Juan Ramirez, Jr, and David L. Levy are residents of Miami-Dade County, Florida, and judges of the Florida Third District Court of Appeal, and were sued personally.

Petitioner-here was also the appellant in an appeal assigned Case Number: 3D03-2083 in the Florida Third District Court of Appeal. On March 9, 2004, Petitioner appeared to orally argue case Number: 3D03-2083 before a three-judge panel of that court which panel included Respondents Juan Ramirez, Jr. and David L. Levy. After oral arguments on unrelated cases were concluded, the presiding judge of the panel – Judge Harris – at 10:25 a.m. announced a 15 minute recess before taking up the oral argument in Petitioner's Case Number: 3D03-2083.

Five minutes later at 10:30 a.m., Petitioner left the courtroom and proceeded to the Lawyers Lounge where the Men's room is located to use the facilities prior to oral argument. Upon entering the Lawyers Lounge, Petitioner saw only three people: Respondent Juan Ramirez, Jr., Respondent David L. Levy and the counsel for appellee in Case Number 3D03-2083 – Jay Levy. Petitioner observed these three engaged in an animated discussion concerning some legal point regarding the Florida Supreme Court.

Petitioner immediately proceeded to the Men's room, used the facilities and left within 2 minutes. During that time, Petitioner could hear the muted voices of Respondents Juan Ramirez, Jr., and David L. Levy and appellee's counsel Jay Levy through the door, though he could not hear the specifics of their conversation. As Petitioner left the Men's room, he again observed Respondents Juan Ramirez, Jr., and David L. Levy and appellee's counsel Jay Levy engaged in conversation, this time of a ribald nature.

Alleged by Petitioner – and subsequently admitted by the Respondents who were shortly to hear oral argument and decide Petitioner's case – is the appalling fact that the Respondents were involved in an un-noticed, *ex parte,* communication with Petitioner's opposing counsel Jay Levy in conversation both legal and inappropriate immediately preceding oral argument before them.

Several minutes later, at the commencement of Petitioner's oral argument in Case Number 3D03-2083, Petitioner made an *ore tenus* motion to disqualify Respondents Juan Ramirez, Jr and David L. Levy based upon the behavior described above. Judge Harris denied the *ore tenus* motion to disqualify Judges Juan Ramirez, Jr. and David L. Levy and Petitioner was forced and understandably chilled to argue the matter before the Respondents.

On March 30, 2004, Petitioner wrote Respondents and Jay Levy demanding that "[p]ursuant to the authority of *The Florida Bar v. Mason,* 334 So.2d 1,7 (Fla. 1976)" that they "promptly disclose the sum and substance of the *ex parte* communication had between the three of you identified above in the Lawyer's Lounge of the Third District Court of Appeal on March 9, 2004, at approximately 10:30 a.m." Notably to date, neither Respondents nor opposing counsel Jay Levy has responded to this request and disclosed the nature of their *ex parte* communications preferring instead to hide behind the protection of judicial immunity.

Several weeks later, *sua sponte,* Respondents entered orders disqualifying themselves from Case No.: 3D03-2083 forcing re-argument before a new panel.

As a result of Respondents above-described actions, under 42 U.S.C. §1983 and §1985(2), Petitioner sought damages personally against the Respondents for violating his fundamental and Constitutional rights.

The first claim of the Complaint states: "[Petitioner] brings this claim pursuant to Title 42 U.S. Code §1983 as [Respondents], in their capacities as Judges of the Florida Third District Court of Appeal, under color of the statutes, ordinances, regulations, customs, and/or usage, of the State of Florida, subjected, or caused to be subjected, [Petitioner] to the deprivation of his rights, privileges, or immunities secured by the Constitution and laws, to wit, due process, equal protection, his fundamental rights as a father and access to courts."

The second claim states: "After a reasonable opportunity for further investigation or discovery, [Petitioner] will establish that [Respondent] Juan Ramirez, Jr., [Respondent] David L. Levy and Jay Levy were discussing Case No.: 3D03-2083 without [Petitioner] being present and conspiring for the purpose of impeding, hindering, obstructing, or defeating, the due course of justice in the State of Florida, with intent to deny to [Petitioner] the equal protection of the laws, or to injure [Petitioner] or [Petitioner]'s property for lawfully enforcing, or attempting to enforce, the right of [Petitioner] to the equal protection of the laws."

In both claims, Petitioner alleges as damages that Petitioner "suffered denial of guaranteed rights, delay in the resolution of his claims raised in Case Number 3D03-2083, additional costs associated with having to re-argue his case along with the cost of pursuing this action in order to establish and protect those rights."

Petitioner filed the complaint on July 9, 2004. Upon the Respondent's motion to dismiss, the District Court entered its order granting that motion on August 16, 2004, solely upon the legal and factual conclusion that Respondents were immune from suit under the doctrine of judicial immunity. *Appendix-2.*

Finding no reversible error, the Eleventh Circuit affirmed the dismissal of the complaint holding that (i) the alleged *ex*

parte communication was not taken in the "absence of all jurisdiction" and (ii) the alleged *ex parte* communication was part of "a function normally performed by a judge." *Appendix-8.*

REASONS FOR GRANTING THE WRIT

The reason for granting this writ is that the Eleventh Circuit (i) has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; (ii) has decided an important federal question in a way that conflicts with a decision by a state court of last resort; and (iii) has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in three areas.

First, that a district court may not trespass upon the province of the jury to conclude that there are "no set of facts" which could overcome the affirmative defense of judicial immunity when discovery of facts solely in the possession of the Respondents may well reveal such facts.

Second, that the Eleventh Circuit has expanded the judge-made doctrine of judicial immunity to vitiate the protections afforded by 42 U.S.C. §1983 and §1985(2).

Third, that the "Do Not Publish" rule of the Eleventh Circuit impermissibly avoids the seminal doctrine of *stare decisis.*

I. The Determination of Absolute Immunity Is a Jury - Not Judge - Question

Respondent's legal claims for damages arose under 42 U.S.C. §1983 and §1985(2). "Our settled understanding of §1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action

at law. *Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710 (1999). "In actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment. [*Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996)]". *Monterey* at 718.

Plainly, "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958).

Here, pursuant to Rule 38, Federal Rules of Civil Procedure, Respondent demanded a jury trial. Hence, it was error for the District Court to usurp the province of the jury in determining factual conclusions as to the applicability of the affirmative defense of absolute judicial immunity at the Rule 12(b)(6) stage.

What the District Court found was that – as a matter of law – that the actions of the Respondents were (i) acts within the scope of their jurisdiction and (ii) acts which were judicial in nature. *Appendix-6*. Such conclusions ignores the minimal pleading requirements of Federal Rules Civil Procedure, Rule 8 and leads to an absurd conclusion.

"The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system. . . Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002).

Here, as plead by Petitioner under 42 U.S.C. §1985(2):

> After a reasonable opportunity for further investigation or discovery, [Petitioner] will establish that [Respondent] Juan Ramirez, Jr., [Respondent] David L. Levy and Jay Levy were discussing Case No.:3D03-2083 without [Petitioner] being present and conspiring for the purpose of impeding, hindering, obstructing, or defeating, the due course of justice in the State of Florida, with intent to deny to [Petitioner] the equal protection of the laws, or to injure [Petitioner] or [Petitioner]'s property for lawfully enforcing, or attempting to enforce, the right of [Petitioner] to the equal protection of the laws.

Hence, the Complaint alleges that facts essential to the claim of Petitioner are "under the exclusive control of the [Respondents]" as Petitioner was not privy – and the Respondents have refused to reveal – the substance of their *ex parte* communications with Petitioner's opposing counsel in 3D03-2083.

Thus the absurdity of the District Court's decision is laid bare: If the presently-in-the-exclusive-possession-of-the-Respondents-but-revealed-through-discovery-facts ultimately establishes that the Respondents were "conspiring for the purpose of impeding, hindering, obstructing, or defeating, the due course of justice in the State of Florida", the rights guaranteed to Respondent by §1983 and §1985 are discarded simply because (i) the Respondents were wearing their black robes and (ii) they were in a courthouse at the time of the alleged violation of §1983 and §1985. Plainly, if Respondents had been conspiring to murder Petitioner during oral argument, judicial immunity would not attach. Yet as Rules 8 and 11 requires no more specificity in the Complaint and discovery was denied by the district court, Respondents – and hence all Florida judges – are given a free pass to violate §1983 and §1985 with

impunity.

This is what the District Court has ordained and the Eleventh Circuit approved by precluding any discovery as to the nature of the "secret" – and now admitted – *ex parte* discussions between Respondents and Petition's opposing counsel immediately preceding oral argument before the Respondents.

Finally, the District Court clearly relied on evidence outside the four corners of the complaint in rendering its decision. At footnote #3 of the order below, the district court incorporates facts and events alleged to have occurred by the Respondents in their motion to dismiss into her decision. *Appendix-2.* To so traverse outside the four corners of the complaint is clear error.

Upon review of the question of the jurisdiction of Florida Appellate judges, the Eleventh Circuit, citing its own case of *Dykes v. Hoseman,* 776 F.2d 942, 946 (11th Cir. 1985), continued the District Court's usurping of the role of the jury stating:

> Considering these four factors, we conclude that Judge Ramirez and Levy's actions when presiding over Sibley's appeal were judicial in nature. Even if, as Sibley alleges, Judges Ramirez and Levy had acted improperly immediately prior to Sibley's oral argument, when they presided over Sibley's appeal they were acting in their judicial capacity.

Appendix-11. That conclusion of the Eleventh Circuit was based upon the Rule 8-satisfying allegations of the Complaint without benefit of any evidence from witnesses expert in the scope of "judicial capacity".

Likewise, the Eleventh Circuit invaded the province of the

jury in determining that *ex parte* discussions were normal functions of Florida appellate judges. "Therefore, while it may have been improper or unwise for Judges Ramirez and Levy to engage in conversation with Sibley's opposing counsel moments before oral argument, presiding over an appeal and conducting discussion with counsel on the proper disposition of an appeal is a function normally performed by a judge." *Appendix-12* Again, it would be for the jury – after testimony about the "normal junctions" of Florida Appellate judges – to determine whether meeting *ex parte* with opposing counsel and refusing to disclose the substance of that meeting held immediately prior to oral argument is a "normal function" of a Florida Appellate judge.

Accordingly, the factual determination of whether the *ex parte* communication was (i) an act taken in Respondents' "judicial capacity" and (ii) a "normal function" of Respondents as Florida Appellate judges, belonged to the jury – not the court.

II. Appellees Do Not Enjoy Judicial Immunity

Simply stated, judicial immunity does not lie as the four corners of the complaint competently plead that Respondents were (i) acting outside the scope of their jurisdiction and (ii) took an act which was not judicial in nature. These exceptions to absolute judicial immunity are well established in common law. "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991).

A. Respondents Acted In the "Complete Absence of Jurisdiction"

The seminal case on "complete absence of jurisdiction"

barring judicial immunity from attaching is *Bradley v. Fisher*, 80 U.S. 335, 352 (1872). In that case, this Court stated:

> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority.

Here, Respondents, as Florida Appellate Court judges, have jurisdiction only as to appellate matters. The jurisdiction of an District Court of Appeal judge in Florida is expressly defined in Florida by the Florida Constitution, Article V, §2(a), ("The supreme court shall adopt rules for the practice and procedure in all courts"), §4(b) ("Jurisdiction - (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court."

Significant to the question of the scope of a Florida appellate judge's jurisdiction is the Florida Supreme Court enacted Florida Rules of Appellate Procedure, Rule 9.200, which states: "The Record – (a) Contents. (1) Except as otherwise designated by the parties, the record shall consist of the original documents, exhibits, and transcript(s) of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices, depositions, other discovery, and physical evidence."

Hence, a Florida District Court of Appeal judge is limited in exercising his or her jurisdiction to considering only those

items as authorized by Rule 9.200. "One obvious reason for such a rule is that evidence and matters outside the record may not thereafter be properly made a part of the record on appeal for review by an appellate court." *Reynolds v. Burt*, 359 So.2d 50, 51 (Fla.App. 1 Dist. 1978). Here, by allegedly discussing the case with opposing counsel *ex parte*, Respondents have acted outside their limited jurisdiction as Florida Appellate judges which restricts them to considering only the items permitted by Rule 9.200.

As such, Respondents were acting outside the scope of their limited jurisdiction by their alleged *ex parte* discussion of the Case No.: 3D03-2083 with Petitioner's opposing counsel.

B. Respondents Acts Were Not "Judicial"

As detailed in *Barrett v. Harrington*, 130 F.3d 246, 255 (C.A.6 (Tenn.) 1997):

> The Supreme Court has established a two-prong test to determine whether an act is "Judicial." First, the Court must consider whether the function is "normally performed by a judge." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). This functional approach examines the "nature" and "function" of the act, not the act itself. Furthermore, "even if a particular act is not a function normally performed by a judge, we are directed to 'look to the particular act's relation to a general function normally performed by a judge.'" *Barnes v. Winchell*, 105 F.3d 1111, 1116 (6th Cir.1997) Second, the court "must assess whether the parties dealt with the judge in his or her judicial capacity."

Here, Petitioner maintains that the alleged acts of Respondents are acts that are not "normally performed by a judge." Plainly,

Florida Appellate Judges "normally" do not engaged in *ex parte* discussions of the merits of a case immediately before oral arguments with opposing counsel.

This "taken as true" allegation is directly analogous to the situation found in *Rankin v. Howard*, 633 F.2d 844 (9th Cir.1980), *cert. denied*, 451 U.S. 939 (1981), where the court found that the acts were not "judicial", holding:

> Although a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his 'judicial capacity,' the other party's expectation, i.e., judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not 'a function normally performed by a judge.' It is the antithesis of the 'principled and fearless decision-making' that judicial immunity exists to protect. See *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Gregory v. Thompson*, 500 F.2d at 63 (9th Cir.1974). . . .We conclude that a judge's private, prior agreement to decide in favor of one party is not a judicial act.

Here, Respondents likewise engaged in behavior that "is the antithesis of the 'principled and fearless decision-making' that judicial immunity exists to protect" by meeting *ex parte* with opposing counsel immediately prior to oral argument. As such, Respondents was not performing "judicial acts" and as such judicial immunity does not apply.

Moreover, applying the second test enunciated in *Rankin*, the court "must assess whether the parties dealt with the judge in his or her judicial capacity." Plainly, one cannot deal with a judge in his judicial capacity when that capacity expressly prohibits *ex-parte* communication as alleged here.

Florida Cannon 3.B(7) states:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties . . . (Emphasis added.)

As such, the Eleventh Circuit's holding conflicts with that of the Florida Supreme Court. *See*: *Barwick v. State*, 660 So. 2d 685, 692 (Fla.1995)("a judge is not to have any substantive communication with counsel for any party, including counsel for the State, unless such communication is expressly authorized by statute or rule"); *Inquiry Concerning Miller*, 644 So.2d 75, 78 (Fla. 1994)("This canon implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all *ex parte* communications except when they are expressly authorized by statutes or rules"); *Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992)("Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. (Emphasis added).

Admittedly, the Ninth Circuit retreated from *Rankin* in *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) but such retreat is inapposite to the question here as the Ninth Circuit articulated federal, not the *Erie*-applicable Florida, law on the scope of judicial immunity. Moreover, this Court was not given a chance to review the retreat in *Ashelman* after it had declined to review the contrary rule in *Rankin*.

Moreover, the judicial immunity doctrine found by the Ninth Circuit in *Ashelman* (1986) and the Eleventh Circuit in *Dykes v. Hosemann*, 776 F2d 942, 946 (11th Cir. 1985) limited the significance of this Court's holding in the prior case of *Pulliam v. Allen*, 466 U.S. 522 (1984), to crediting that opinion only with the holding that prospective injunctive relief was not barred by the doctrine of judicial immunity. *Ashelman* at 1075, *Dykes* at footnote #13.

Pulliam said a great deal more regarding the scope of §1983 stating:

> In *Ex parte Virginia*, 100 U.S. 339 (1880), §4 of the Civil Rights Act of 1875, 18 Stat. 336, was employed to authorize a criminal indictment against a judge for excluding persons from jury service on account of their race. The Court reasoned that the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the equal protection of the laws. Since a State acts only by its legislative, executive, or judicial authorities, the constitutional provision must be addressed to those authorities, including the State's judges. Section 4 was an exercise of Congress' authority to enforce the provisions of the Fourteenth Amendment and, like the Amendment, reached unconstitutional state judicial action. The interpretation in *Ex parte Virginia* of Congress'

> intent in enacting the Civil Rights Acts has not lost its force with the passage of time.

Id. at 540. Indeed, Congress has recently amended §1983 in a manner which calls into question the viability of the holdings in *Ashelman* and *Dykes.*

Congress plainly has the authority to enforce the Fourteenth Amendment by appropriate legislation and limit the judicially-created doctrine of judicial immunity pursuant to §5 of that amendment which states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Accord*: *Monroe v. Pape*, 365 U.S. 167. 171 (1976). Congress has done so by enacting 42 U.S.C. §1983, "Civil action for deprivation of rights", which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, **except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.** (Emphasis added.)

In enacting the emphasized portion the intention of Congress to vest jurisdiction in the district court to hear the sort of claim brought by Petitioner was made clear in the Report by the Senate Committee on the Judiciary on §311 of the Federal

Courts Improvement Act of 1996, which amended §1983 as emphasized above:

> This section does not provide absolute immunity for judicial officers. **Immunity is not granted for any conduct "clearly in excess" of a judge's jurisdiction, even if the act is taken in a judicial capacity.** Moreover, litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable. Section 311 restores the full scope of judicial immunity lost in *Pulliam* and will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to the judicial process. (Emphasis added.)

Senate Report, 104-366, page 37. Hence, this Court's statement in *Pulliam* that "[i]n *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the Court found no indication of affirmative congressional intent to insulate judges from the reach of the remedy Congress provided in §1983. The Court simply declined to impute to Congress the intent to abrogate common-law principles of judicial immunity" can no longer be consider valid. *Pulliam* at 540.

Congress has most clearly abrogated the "common-law principles of judicial immunity" by its enactment of the 1996 amendment to §1983. Congress clearly had the chance to confirm that immunity in the expansive manner the Eleventh Circuit has determined, but choose not to do so instead limiting itself to restoring "the full scope of judicial immunity lost in *Pulliam*". Noteworthy is that if that was the intent, the amendment only restores the immunity as to declaratory and injunctive relief – not criminal, and thus certainly civil damages – for judges who trespass upon the rights secured by §1983 as

recognized in *Ex parte Virginia*.

As such, given the new parameters of judicial immunity created by the 1996 amendment to §1983, *Ashelman* and *Dykes* are of questionable authority. Indeed, perhaps it is time for this Court to consider the wisdom of Judge Hatchett who wrote in his dissent in *Dykes*:

> The *en banc* court holds that judicial immunity is complete, unqualified, and without exception. According to the majority, judicial immunity even protects a judge who . . . unlawfully conspires with a party to violate another party's federal constitutional rights. As the majority concedes, no precedent, Supreme Court or otherwise, requires such a broad definition and application of the judicial immunity doctrine.
>
> Contrary to the majority's view, no policy considerations justify such a result. More importantly, the majority's opinion implicitly repeals one third of a congressional enactment [– 42 U.S.C. §1983 –] specifically designed to protect the federal constitutional rights of citizens from deprivations by state officers, including judges. . . . With the filing of the majority opinion, this important enactment for the protection of citizens of the United States may as well read: "Every person, [except a judge in Florida, Georgia and Alabama]..." Judges in these former states of the confederacy will be able to deal willy nilly with the rights of citizens without having to account for willful unconstitutional actions.
>
> This important congressional enactment is amended by [the opinion in *Dykes*] to apply only

> to state officials in the legislative and executive branches. It is another whittling away of section 1983's application. I respectfully dissent. . . . It is difficult to understand how every person in the United States may be held accountable in damages for conspiring to violate another person's federal constitutional rights, except those persons trained in constitutional guarantees, charged with interpreting the constitution, and oath bound to deal fairly with parties to litigation.

Id. at 954-955.

Accordingly, the ramifications of this radical expansion of judicial immunity by the Eleventh Circuit which started in *Dykes* and now continues in this matter – which permits judges to conspire with one party to a litigation to deprive fundamental and constitutionally guaranteed rights of the other party to the litigation with impunity – must be addressed by this Court.

III. The "Do Not Publish" Decision of the Eleventh Circuit Conflicts with the Holding of the United States Court of Appeal for the Eight Circuit, Calls for an Exercise of this Court's Supervisory Power and Raises an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court

Invoking Eleventh Circuit Rule 36-2, the Eleventh Circuit's opinion in this matter was ordered as "Do Not Publish". Appendix-8, *infra*.. Rule 36-2 states "An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such a citation

is made."

Rule 36-2 and it use in this matter, (i) conflicts with the holding of the United States Court of Appeal for the Eighth Circuit, (ii) departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and (iii) raises an important question of federal law that has not been, but should be, settled by this Court.

In *Marbury v. Madison*, 5 U.S. 137 (1803) this Court recognized that inherent in every judicial decision was a declaration and interpretation of the relevant general principles of law. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

Fundamental to this decision making process was that the enunciated law be subsequently applied to subsequently similarly situated litigants. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). "But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Id.* at 544.

Indeed, this principle of reliance upon enunciated precedent is at the backbone of our legal system. As most eloquently stated by Justice Joseph Story, *Commentaries on the Constitution of the United States* §377-78 (1983): "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."

Here, the use of "Do Not Publish" is the very "alarming doctrine" of which Justice Story speaks. By designating the

opinion below "Do Not Publish", the Eleventh Circuit has permitted itself the ability (i) to ignore its relevant prior "Do Not Publish" opinions in deciding this matter and (ii) ignore this opinion when a similarly situated matter occurs in the future. Plainly, such power violates the "fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co.* at 544.

In *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated,* 235 F.3d 1054 (8th Cir. 2000) (en banc)[1], the court in addressing the constitutionality of its Rule 28A(i) – similar in effect to the Elev1enth Circuit's Rule 36-2 – held:

> Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. . . . Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. **Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.** (Emphasis added).

Id. at 905. More recently, in *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001), three judges of the Fifth Circuit dissented from a denial of a petition for rehearing *en*

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[1] The vacation *en banc* in *Anastasoff* is based upon the contested issue becoming moot, not upon a retreat from the holding contained in the original panel decision.

banc based upon grounds that Fifth Circuit Rule 47.5.4 -- an analog to Eleventh Circuit Rule 36-2 – was unjustified, raised important questions involving equal protection and warranted full consideration by the Fifth Circuit *en banc*.

Accordingly, certiorari review under Rule 10(a) is appropriate as Rule 36-2 of the United States Court of Appeal for the Eleventh Circuit (i) conflicts with the holding of the United States Court of Appeals in *Anastasoff*, (ii) departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and (iii) raises an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted to review the decision of the Eleventh Circuit for the reasons aforesaid.

Respectfully submitted,

Montgomery Blair Sibley
8511 Ziggy Lane
Gaithersburg, Maryland 20877

Counsel for Petitioner

Contents of Appendix

Opinions Below

The August 16, 200, order of the United States District Court for the Southern District of Florida *Appendix-2*

The January 18, 2005, opinion of the United State Court of Appeals for the Eleventh Circuit *Appendix-8*

The February 22, 2005, order denying Petitioner's motion for rehearing of the United State Court of Appeals for the Eleventh Circuit *Appendix-13*

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved

42 U.S.C. §1983 ..... *Appendix-14*

42 U.S.C. §1985(2) *Appendix-14*

Eleventh Circuit Rule 36-2 ..... *Appendix-15*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case. No. 04-21697-Civ-Lenard
Magistrate Judge Simonton

MONTGOMERY BLAIR SIBLEY,

Plaintiff,

vs.

JUAN RAMIREZ, JR and DAVID L. LEVY,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss Complaint. (D.H. 3), filed on July 29,2004. On August 5,2004, Plaintiff Montgomery Blair Sibley filed his response to Defendants' Motion. (D.E. 6.) On August 13, 2004, Defendants replied. Having reviewed the Motion, Response, Reply and the record, the Court finds as follows.

I. Introduction

Defendants allege that this action stems from a child custody dispute between Plaintiff Sibley and his ex-wife in state court, (Motion at 2.) Defendants point out that Plaintiff has filed multiple suits in federal district court challenging the decisions and/or actions of state appellate judges.[2]

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[2] Defendants list the following four cases in support of this contention: Sibley v. Swartz. et at.. Case No. 03-21728-CIV-JQRDAN; Siblev v. Florida Supreme Court, et at.. Case No. 03-21199-CIV-LENARD; Siblev v. Schwartz. Case No.

In the instant case, Plaintiff seeks money damages for "violation of Plaintiff s civil rights" pursuant to 42 U.S.C. § 1983.[3] He alleges that during a break in oral argument related to his appeal, Case No; 3DQ3-2083 before the Third District Court of Appeal, Plaintiff observed Panel Judges Juan Ramirez, Jr., and David L. Levy conversing with opposing party's counsel, Jay Levy, in an "animated" manner "concerning some legal point regarding the Florida Supreme Court," (Complaint ¶¶ 7-10,) Plaintiff alleges that several minutes later, he again observed Defendants and counsel Levy "engaged in conversation, 1his time "of a ribald nature." Id. ¶12. Plaintiff contends that Defendants were "intimately involved exports with the opposing counsel in conversation both legal and inappropriate," Id. ¶13. Plaintiff Further asserts that when oral argument resumed Plaintiff made an ore tenus motion to disqualify Defendants, which was denied. Id. ¶¶14-15.[4]

01-3746-C1V-K1NG; Siblev v. Gersten. et aL Case No. 00-3665-CIV-MORENO.

[3] Plaintiff claims that he brings his "First Claim for Damages" pursuant to 42 U.S.C. § 1983. (Complaint 117.) He does not explicitly cite the legal basis for his "Second Claim for Damages." *See id.* ¶¶ 19-21.

[4] Defendants assert that after oral argument both of them decided to recuse themselves from Plaintiff's case. In support of this contention, they cite to a "Miscellaneous Order(OR.999)", which they do not attach. (Mot. at 3-4.) Defendants further claim that oral argument was reset before a different panel, and that they had nothing further to do with Plaintiff's appeal, *Id.* at 4. Plaintiff appears to acknowledge this fact in his Complaint when he alleges that he suffered deprivation of rights in part because of the "delay in the resolution of his claims. ..[and] additional costs associated with having to re-argue his case..." (Complaint ¶¶ 18, 21.)

II. Standard of Review

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move for dismissal of a claim that fails to state a claim upon which relief can be granted. The Eleventh Circuit has clearly articulated the standard of review for a Rule 12(b)C6) motion to dismiss:

> "The standard of review for a motion to dismiss is the same for the appellate court as it is for the trial court." *Stephens v. Dep't of Health & Human Servs.*. 901 F.2d 1571, 1573 (11th Cir. 1990). A motion to dismiss is only granted when the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Harper v. Blockbuster Entm't Corp., 139 F.3d 1385,1387 (11th Cir), *cert. denied*, 525 U.S. 1000 (1998). "On a motion to dismiss, the facts stated in appellant's complaint and all reasonable inferences therefrom are taken as true. " *Stephens,* 901 F.2d at 1573.

III. Analysis

In their Motion, Defendants argue that Plaintiff s claim should be dismissed because (1) Defendants are entitled to absolute judicial immunity, (2) Defendants are entitled to Eleventh Amendment immunity, and (3) Plaintiff fails to state a claim upon which relief can be granted. (Mot. at 4-5.) The Court finds that Defendants are entitled to absolute judicial immunity and dismisses Plaintiffs Complaint on this basis.[5]

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[5] It appears that Plaintiff is suing Defendants in their individual capacity and that claim is barred by judicial

It is well established that generally a judge is absolutely immune from suit for money damages. *Mireles v. Waco.* 502 U.S. 9 (1991) (per curiam). This immunity is from suit, and not just from an award of monetary damages. Id. at 11. The purpose of judicial immunity is to protect the public "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson,*386U.S. 547. 554 (1967). Any errors made by a judge may be corrected on appeal, but a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption...." *Id.* There are only two exceptions to the doctrine of judicial immunity, *Mireles*, 502 U.S. at 11. The first exception is when the activity in question is "non-judicial." Id. Whether an act is "judicial" relates to the nature of the act itself and to the parties1 expectations, i.e., whether the act is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity, Id at 12. The second exception is when the activity, though judicial in nature, is taken in the complete absence of all jurisdiction. Id. The scope of jurisdiction must be construed broadly where the issue is the immunity of a judge. *Stump v Sparkman,* .435 U.S. 349, 356 (1978).

In the instant case, the Court finds that Defendants were acting in their judicial capacity over an action that was clearly within the scope of their jurisdiction. Plaintiff argues that Defendants were acting outside of the scope of their limited jurisdiction "by allegedly discussing the case with opposing counsel ex parte." (Resp. at 7.) However, the alleged ex parte discuss ion took place while Defendants were hearing oral

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immunity. To the extent that Plaintiff is attempting to sue Defendants in their official capacity, that claim would be barred by the Eleventh Amendment to the United States Constitution. *See Will v. Michigan Dept. of State Police, et al.,* 491 U.S. 58, 71 (1989).

argument in an appellate case over which it is undisputed that they had jurisdiction. The Supreme Court has observed that where jurisdiction over a general subject matter is vested by law in a judge, the manner in which he exercises that jurisdiction is subject to immunity. See Stump. 435 U.S. at 363 n. 12 (noting that judge had jurisdiction over proceeding, even if he then proceeded erroneously). Thus, the allegation that Defendants engaged in an ex parte conversation during the hearing does nothing to establish that Defendants acted in the complete absence of jurisdiction.

Moreover, there is no merit to Plaintiff s argument that the alleged acts of Defendants were non-judicial. Plaintiff alleges that Defendant's actions were non-judicial because Florida appellate judges do not normally "engage in ex parte discussions of the merits of a case immediately before oral arguments with opposing counsel," citing as support the Ninth Circuit's holding in *Rankin v. Howard*, 633 F.2d 844 (91h Cir. 1980). (Response at 8.) However, the Ninth Circuit has since overruled *Rankin v. Howard*, holding that "a conspiracy ...to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges . . . [a]s long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction." *Ashelman v. Pope*, 793 F.2d 1072,1078 (9th Cir. 1986). More significantly, the Eleventh Circuit has declined to follow *Rankin* holding that "even a judge who is approached as a judge by a party [and conspires with such a party] to violate [another party's federal constitutional rights] is properly immune from a damage suit" brought under section 1983." *Dykes v, Hosemann*, 776 F.2d 942, 946 (11th Cir. 1985) (quoting *Harper v. Merckle*, 638 F.2d 848, 856 n. 9 (5th Cir. 1981)).

In the instant case, even if, as Plaintiff alleges, *ex parte* communications between Defendants and opposing counsel in Plaintiff's appeal occurred, Defendants remain absolutely immune from suit. Thus, the Court finds that it is apparent that

Plaintiff can plead no set of facts in support of his claim that would entitle him to relief.

Accordingly, it is

ORDERED AND ADJUDGED that

1. Defendants' Motion to Dismiss Complaint. (D.E. 3), filed on July 29, 2004, is GRANTED.

2. The case is CLOSED.

3. All pending motions not ruled upon by separate order are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida this 16th day of August, 2004.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Andrea M, Simonton
All Counsel of Record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-14555 Non-Argument Calendar
JAN 18, 2005
D. C. Docket No. 04-21697-CV-JAL

MONTGOMERY BLAIR SIBLEY,

Plaintiff-Appellant,

versus

JUAN RAMIREZ, JR., and DAVID L. LEVY

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
(JANUARY 18, 2005)

Before CARNES, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Montgomery Blair Sibley, an attorney proceeding *pro se*, appeals the district court's grant of the defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The sole basis for the district court's decision to grant the motion was that the defendants, Judges Juan Ramirez, Jr. and David L. Levy, were entitled to absolute

judicial immunity. On appeal, Sibley argues that Judges Ramirez and Levy were not entitled to absolute judicial immunity because they engaged in a non judicial act that was outside the scope of their jurisdiction. Judges Ramirez and Levy were part of a panel assigned to hear oral argument in Sibley's appeal before the Florida Third District Court of Appeal. Specifically, Sibley alleges that Judges Ramirez and Levy engaged in an *ex parte* discussion regarding the merits of his appeal with Sibley's opposing counsel immediately before oral argument. He argues that such discussion is not an act normally performed by appellate judges and is specifically prohibited in Florida. Upon review of the record and after consideration of the briefs of the parties, we discern no reversible error and affirm.

We review a district court's dismissal of a complaint *de novo*, accepting all allegations in the complaint as true and drawing all reasonable inferences therefrom in the plaintiff s favor. *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). "[A) complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh v. Butler County, Ala.*, 268 F.3 d 1014, 1022 (11th Cir. 2001) (en banc) (quoting *Conley v. Gibson*, 355 U.S. 41,45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)). However, "[a] complaint may be subject to dismissal under Rule 12(b)(6) when its allegations - on their face - show that an affirmative defense bars recovery on the claim." *Marsh*, 268 F.3d at 1022.

We review a district court's grant of judicial immunity de novo. *Smith v. Shook*, 237 F.3d 1322, 1325 (11th Cir. 2001). The Supreme Court has long recognized that judges are immune from suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 9-10,112 S. Ct. 286, 287, 116 L. Ed. 2d 9 (1991). However, "judicial immunity is an immunity from suit, not just from ultimate assessment of damages. Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the

existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." *Id.* at 11. Rather, absolute judicial immunity is overcome only when a judge's action is (1) nonjudicial, i.e., not taken in the judge's judicial capacity; or (2) though judicial in nature, taken in complete absence of all jurisdiction. *Id.* at 11-12; *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000). Where the issue is immunity of a judge, the scope of jurisdiction must be construed broadly. *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105, 44 L. Ed. 2d 331 (1978). At the time of oral argument, Judges Ramirez and Levy clearly had subject matter jurisdiction over Sibley's appeal. Therefore, whether Sibley can overcome absolute judicial immunity hinges upon whether the alleged action was nonjudicial.

"Whether an act by a judge is a `judicial' one relate[s] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Mireles*, 502 U.S. at 11 (quoting *Stump*, 435 U.S. at 362 (alternation in original)). We have focused on four factors for determining whether an act is judicial:

> (1) the precise act complained of... is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

Dykes v. Hoseman, 776 F.2d 942, 946 (11th Cir. 1985) (citations omitted). Considering these four factors, we conclude that Judge Ramirez and Levy's actions when presiding over Sibley's appeal were judicial in nature. Even if, as Sibley alleges, Judges Ramirez and Levy had acted improperly immediately prior to Sibley's oral argument, when they presided over Sibley's appeal

they were acting in their judicial capacity. See *Dykes*, 776 F.2d at 946 (holding that a judge's signing of a custody order was a judicial act, notwithstanding an allegation that the judge made a prior agreement with a party in controversy to grant custody of a child to that party); *Scott v. Dixon*, 720 F.2d 1542, 1546-47 (11th Cir. 1983) (applying judicial immunity to a court clerk despite allegations that the court clerk and another defendant conspired with one another or reached an understanding concerning a judicial act - issuance of an arrest warrant); *Harper v. Merckle*, 638 F.2d 848, 856 n.9 (5th Cir. Unit B 1981) (noting that "even a judge who is approached as a judge by a party for the purpose of conspiring to violate [§] 1983 is properly immune from a damage suit").

Moreover, even if we were to focus solely on the *ex parte* communication, as Sibley suggests, Judges Ramirez and Levy were entitled to immunity because "the relevant inquiry is the `nature' and `function' of the act, not the act itself." See *Mireles*, 502 U.S. at 12-13 (directing courts, when evaluating a judicial immunity question, to look at a particular act's relation to the general function normally performed by a judge instead of focusing on the act itself). As the Supreme Court explained in *Mireles*, "if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a `nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge `will not be deprived of immunity because the action he took was in error. . . or was in excess of his authority.'" 502 U.S. at 12-13. Therefore, while it may have been improper or unwise for Judges Ramirez and Levy to engage in conversation with Sibley's opposing counsel moments before oral argument, presiding over an appeal and conducting discussion with counsel on the proper disposition of an appeal is a function normally performed by a judge.

Since Judges Ramirez and Levy's conduct was judicial

and not taken in the complete absence of all jurisdiction, they were entitled to absolute judicial immunity from Sibley's suit and it was properly dismissed. Accordingly, we affirm.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No.: 04-14555-HH

MONTGOMERY BLAIR SIBLEY,

Plaintiff-Appellant,

versus

JUAN RAMIREZ, JR., and DAVID L. LEVY,

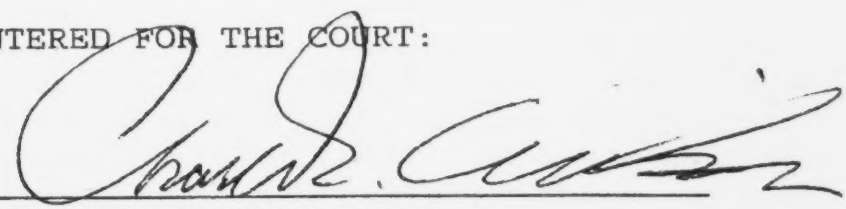
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: CARNES, MARCUS and WILSON, Circuit Judges.
PER CURIAM:

The petition(s) for rehearing filed by the APPELLANT is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41

Filed: U.S. Court of Appeals, Eleventh Circuit
February 22, 2005
Thomas K. Kahn, Clerk

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1985. Conspiracy to interfere with civil rights.

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or

attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Eleventh Circuit Rule 36-2:

An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such a citation is made.